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No. 93-0778

In The

Supreme Court of the United States

October Term, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackle, apparel and furniture, *in rem;*

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held that Petitioner failed to have a sufficient proprietary interest for the recovery of solely economic damages under the maritime law.

LIST OF PARTIES

Respondent, Midland Enterprises Inc., respectfully relies upon the List of Parties provided by Petitioner, BP North America Petroleum, Inc., in its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit except as amended below.[1]

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[1] Respondent, Midland Enterprises Inc., has no parent company or companies. The following entity represents a partially-owned subsidiary of Midland Enterprises Inc.: Lucy Marine Services, Inc.

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STATUTES INVOLVED

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled;

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water; *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing

to the Federal agency owning or operating the vessel causing the injury or damage.

PRELIMINARY STATEMENT

Respondent, Midland Enterprises Inc. ("Midland"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the United States Court of Appeals for the Fifth Circuit's opinions in this case. The opinions have been reported at *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193 (5th Cir. 1993), and at *IMTT-Gretna v. Robert E. Lee SS*, 999 F.2d 105 (5th Cir. 1993).

COUNTERSTATEMENT OF THE CASE

This action arises out of alleged damages resulting from the S/S Robert E. Lee's allision on January 24, 1991, with a barge moored at a Mississippi River dock facility comprised of other barges anchored in the river. (R. at 242.)[2] Petitioner, BP North America Petroleum, Inc. ("BPNAP"), alleges that it sustained solely economic damages caused by physical damage to the dock facility owned by IMTT-Gretna in Gretna, Louisiana. (R. at 242-43.)

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[2] The references to the record by Respondent hereinafter pertain to Civil Action No. 92-0295 in the Eastern District of Louisiana unless otherwise noted.

The S/S Robert E. Lee, a vessel owned by Waterman Steamship Corporation ("Waterman"), is one of the largest cargo vessels navigating the Mississippi River. On January 24, 1991, this vessel departed the First Street Wharf in New Orleans, Louisiana, and proceeded upriver to commence a starboard turn that would ultimately permit her to travel southward out of the Mississippi River. Because of her size, this vessel takes up the entire navigable width of the river to effect such a turn.

The vessel navigated too closely to the west bank of the Mississippi River (that is, the right descending bank) during this turn and made contact with a barge moored at IMTT-Gretna's dock and in the tow of the M/V Thomas Hearndon. The S/S Robert E. Lee's master and pilot alleged that the M/V Gayle B, a vessel owned by Midland Enterprises Inc., failed to "hold up" sufficiently below the turning point and caused and/or contributed to the allision at issue. (No. 92-0174, R. at 259.) In the proceedings below, Midland vehemently denied such allegation. (No. 92-0174, R. at 258.) However, in any event, the S/S Robert E. Lee's allision with the barge only caused damage to the moored barges comprising the dock facility and a pipeline associated therewith. Petitioner did not own any of the property suffering physical damage as a result of the allision.

BPNAP and IMTT-Gretna had entered into an Agreement of General Conditions (the "Agreement") dated October 19, 1990, prior to this incident. (R. at 88, 177, 240.) The Agreement provided for storage of bulk liquids by BPNAP at IMTT-Gretna's facility. Furthermore, IMTT-Gretna provided BPNAP with a dedicated pipeline and

preferential barge access to one of the docks at the facility. IMTT-Gretna, however, retained exclusive ownership, control and administration of its Gretna facilities pursuant to the Agreement.

The record before the courts below also established a number of other undisputed material facts. First, in or about October 1990, BP Oil, the parent corporation of BPNAP, sold the facilities in question to IMTT-Gretna. (R. at 160.) Further, at the time of the allision, Petitioner, BPNAP, owned no equipment or other property at the Gretna facility (R. at 173.); nor did BPNAP sustain any loss of its bulk liquids being stored at this facility. (R. at 173-74.) In addition, no employees or representatives of BPNAP worked at IMTT-Gretna's facility on a day-to-day basis nor were any BPNAP employees present on the day of the allision. (R. at 159, 174.) BPNAP also did not insure (nor did it have an obligation to do so pursuant to the Agreement) the docking and storage facilities in question. (R. at 181.) IMTT-Gretna maintained and repaired the facilities at all pertinent times and paid for survey costs after the allision. (R. at 168, 177.) Finally, under the Agreement, BPNAP did not have any right or obligation to control the manner in which IMTT-Gretna managed and administered its facilities. (R. at 166.)

Petitioner instituted this action on January 23, 1992, against the S/S Robert E. Lee *in rem* and against Waterman Steamship Corporation ("Waterman") and International Shipholding Corporation ("International Shipholding") *in personam* in the United States District Court for the Eastern District of Louisiana, by filing a verified complaint. (R. at 240-47.) BPNAP filed suit to recover solely economic damages allegedly resulting

from the S/S Robert E. Lee's allision on January 24, 1991, with the barge moored at a Mississippi River facility owned by IMTT-Gretna.

The District Court thereafter ordered that this action be transferred and consolidated with a pending action entitled *IMTT-Gretna v. S/S Robert E. Lee, Waterman Steamship Corporation, and International Shipholding Corporation*, No. 92-0174 (E.D. La. Jan. 14, 1992). (No. 92-0174, R. at 234-36.) In the related action, IMTT-Gretna had filed suit on January 14, 1992, to recover damages including the cost of repairs to its facility, the loss of use during repairs, survey fees, and other incidental expenses allegedly resulting from the aforementioned allision. (No. 92-0174, R. at 283-87.) Subsequently, Waterman filed third-party complaints against Midland Enterprises Inc. *in personam* and the M/V Gayle B *in rem* seeking indemnification and contribution in both actions and, pursuant to Rule 14(c) of the Federal Rules of Civil Procedure, tendered these parties directly to the Petitioner. (No. 92-0174, R. at 243-55, 258-70.)

Midland filed answers in both actions to the third-party complaints and to the original complaints on March 30, 1992. (R. at 218-33.) In these answers, the Respondent denied liability in the premises. Furthermore, Midland asserted a cross-claim against Waterman seeking indemnification and contribution.

The District Court thereafter set trial to commence on October 14, 1992. (R. at 217.) On September 8, 1992, the S/S Robert E. Lee, Waterman, International Shipholding, and Midland filed motions for summary judgment on the issue of liability for BPNAP's damages. (R. at 130,

137-38.) After extensive briefing, the trial court granted the motions for summary judgment and dismissed BPNAP's claims against all parties. (R. at 256-60.) In so doing, the District Court held that the decisions in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) [hereinafter *Robins Dry Dock*], and in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied*, 477 U.S. 903 (1986), precluded recovery of the damages being sought by BPNAP.

IMTT-Gretna settled its claims against the S/S Robert E. Lee, Waterman, and International Shipholding prior to trial. (R. at 251.) On October 6, 1992, the District Court granted a motion filed pursuant to Rule 41(c) of the Federal Rules of Civil Procedure to dismiss the third-party claims of Waterman against Midland and the M/V Gayle B. (R. at 252-54.) Consequently, the trial court entered a final judgment on the same date dismissing BPNAP's claims against the remaining parties. (R. at 251.) Petitioner, BPNAP, filed its Notice of Appeal from this judgment on November 2, 1992. (R. at 249.)

The Court of Appeals affirmed the judgment of the District Court on June 25, 1993. *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193, 1195 (5th Cir. 1993). In so doing, the court held that "[t]he district court correctly granted summary judgment in favor of defendants because of the appellant's lack of a proprietary interest." *Id.* at 1194. Furthermore, the Court of Appeals found that the District Court correctly refused to permit reliance by Petitioner on a state law remedy where the maritime law denied such a remedy. *Id.* Thus, the courts below agreed that Petitioner failed to demonstrate a sufficient proprietary

interest to defeat summary judgment and that the maritime law preempted any state law remedy asserted by BPNAP.

Petitioner thereafter sought to dismiss its state law claim for lack of subject matter jurisdiction. *See IMTT-Gretna v. Robert E. Lee SS*, 999 F.2d 105, 106 (5th Cir. 1993). Based on its alleged "discovery" at the appellate level, BPNAP contended that both the District Court and the Court of Appeals lacked jurisdiction to hear the state law claim because the parties failed to be diverse in citizenship. *Id.* On August 16, 1993, the Court of Appeals, however, held that the state law claim had been properly considered pursuant to federal maritime jurisdiction and that the Petitioner would not be afforded a "second bite" in a state court forum. *Id.* The court, therefore, denied the partial motion to dismiss and the petition for rehearing filed by BPNAP.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The courts below properly held that Petitioner failed to have a sufficient proprietary interest for the recovery of solely economic damages under the maritime law.

A. The courts below followed an unbroken line of authority.

The courts below followed an unbroken line of authority in denying recovery to the Petitioner in this case. For more than sixty-five years, the maritime law has

required the showing of a sufficient proprietary interest for the recovery of solely economic damages.[3]

The United States Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), held that a party may not recover in admiralty from a tort-feasor for a breach of contract resulting from physical injury by such tort-feasor to property belonging to another party. *Id.* at 308-09. *See generally* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 13-6, 13-7 (1987 & Supp. 1992) (discussing damages recoverable under *Robins Dry Dock*); Michael P. Sullivan, Annotation, *Robins Dry Dock Doctrine Limiting Recovery for Economic Losses Due to Unintentional Maritime Torts*, 88 A.L.R. Fed. 295 (1988 & Supp. 1993) (noting *Robins Dry Dock* precludes recovery absent physical injury to proprietary interest). In *Robins Dry Dock*, a vessel's time charterers sought to recover damages for the loss of use of a steamer caused by a tort-feasor's damage to its propeller. In denying recovery, the Court applied long-standing precedent to hold that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under contract with that other unknown to the doer of the wrong." *Robins Dry Dock*, 275 U.S. at 309; *see Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir.

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[3] Petitioner did not contest the validity of this principle in the proceedings below. This Court usually "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Thus, to the extent that Petitioner objects to the "proprietary interest" standard, it failed to preserve such objection for review on a writ of certiorari.

1985), *cert. denied*, 477 U.S. 903 (1986). Thus, having considered the clear import of the well-established rule applied in *Robins Dry Dock*, Petitioner did not attack its validity in the courts below but rather sought to escape the effect thereof.

The United States Court of Appeals for the Fifth Circuit directly confronted an invitation to abandon the *Robins Dry Dock* doctrine only eight years ago and declined to do so in an *en banc* decision. *See M/V Testbank*, 752 F.2d at 1020. In so doing, the Fifth Circuit remarked: "The principle that there could be no recovery for economic loss absent physical injury to a proprietary interest was not only well established when *Robins Dry Dock* was decided, but was remarkably resilient as well." *Id.* at 1023. The *Robins Dry Dock* and *M/V Testbank* cases represent applications of a well-established maritime law principle. Petitioner, however, sought to overcome such principle and recover solely economic damages arising out of physical injury to a third-party's dock facility.

The opinions rendered by the courts below followed this well-established, unbroken line of authority in applying the *Robins Dry Dock* rule to this case. Notwithstanding the Petitioner's protestations to the contrary, the Court of Appeals did not redefine the term "proprietary interest" to mean only actual ownership. In fact, the Fifth Circuit specifically followed prior precedent and noted the requirements for proprietary interest to be "actual possession or control, responsibility for repair and responsibility for maintenance." *Robert E. Lee SS*, 993 F.2d at 1194; *see Texas Eastern Transmission Corp. v. McMoran Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989). Petitioner, however, failed to

meet any of these criteria upon an examination of the undisputed record by the courts below. Thus, the District Court and the Court of Appeals properly found that no genuine issue of material fact existed over a proprietary interest in the property physically damaged by the S/S Robert E. Lee's allision.

The maritime law precludes recovery of economic damages by a party for injury resulting from physical damage to a third-party's property. No deviation from this long-standing principle of admiralty occurred in the courts below to warrant review by this Court.

B. The courts below properly granted summary judgment under the prevailing legal standards.

The courts below properly granted summary judgment and dismissed Petitioner's claims under the prevailing legal standards. Hence, even assuming *arguendo* that the Court of Appeals incorrectly required actual ownership of the damaged property, the Petitioner's arguments lack merit because the evidence failed to demonstrate physical injury to a proprietary interest.

Rule 56(c) of the Federal Rules of Civil Procedure provides that "judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a moving party satisfies the requisites of Rule 56(c), a motion for summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Finally, the substantive law determines materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Both the District Court and the Court of Appeals properly applied these standards in deciding this action.

The *Robins Dry Dock* decision and its progeny preclude recovery of economic damages absent physical injury to a proprietary interest. Under this rule, the undisputed record in the courts below established summary judgment to be proper because Petitioner lacked a sufficient proprietary interest in IMTT-Gretna's dock facility. Notwithstanding Petitioner's attempts to misconstrue the decisions rendered by the Court of Appeals, the factual record does not lend itself to a result in its favor. The record before the courts below demonstrated that, at most, Petitioner stored bulk liquids in tanks owned by IMTT-Gretna, was a customer of a dedicated pipeline belonging to IMTT-Gretna, and received preferential barge access for its vendor's barges at IMTT-Gretna's dock facility. These facts hardly establish a "proprietary interest" under any rational definition. Thus, pursuant to the *Robins Dry Dock* rule, the standards governing summary judgment supported the decisions reached by the District Court and the Court of Appeals.

The evidence in the courts below failed to demonstrate a sufficient proprietary interest under the proper

legal standards. No basis, therefore, exists to support the granting of a writ of certiorari to review such judgments.

C. No conflict between the circuits exists to warrant review by this Court.

The Fifth Circuit's decision fails to create a conflict between the circuits warranting review by this Court. In essence, Petitioner seeks to manufacture a conflict where none otherwise may be found.

The *M/V Testbank* and the *Robert E. Lee SS* decisions properly applied the "bright line" rule enunciated in *Robins Dry Dock* for recovery of economic damages under maritime law. Contrary to Petitioner's arguments, the Court of Appeals in this case failed to "change the face" of admiralty law or "sharpen" a conflict between the Fifth Circuit and the United States Courts of Appeals for the Second, Fourth, Sixth, and Ninth Circuits. In the first instance, the *M/V Testbank* court specifically reconciled the Second Circuit's holdings in *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) (hereinafter *Kinsman II*), with respect to foreseeability and the application of the *Robins Dry Dock* rule. *M/V Testbank*, 752 F.2d at 1025-26. In so doing, the Fifth Circuit stated: "*Kinsman II*'s general analysis of the problem, however, recognizing as it does the need for the imposition of limitations on recovery for foreseeable consequences of an act of negligence, is compatible with our own." *Id.* at 1026. Thus, as evidenced by the *M/V Testbank* opinion itself, a matter of form rather than true conflict exists between the Second and Fifth Circuits.

The allegedly conflicting opinions rendered by the Fourth and Sixth Circuits also provide no support to Petitioner's cause. In *Venore Transportation Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978), the Fourth Circuit permitted recovery by a time charterer of lost charter hire paid to a vessel's owner. *Id.* at 711. In so doing, the Fourth Circuit cited Fifth Circuit case law without disagreement but ultimately found the *Robins Dry Dock* rule to be inapplicable. *Id.* at 710. Furthermore, in *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the Sixth Circuit also failed to express (or even imply) disagreement with the approach to *Robins Dry Dock* taken by the Fifth Circuit some five years later in *M/V Testbank*. *Id.* at 447-49. Thus, no decisions rendered by the Fourth or Sixth Circuits conflict with the Fifth Circuit's application of the *Robins Dry Dock* rule in this case.

The Ninth Circuit provides the final decision relied upon by Petitioner in its attempt to create a conflict between circuits. In *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992), the court refused recovery to plaintiffs seeking damages in the form of increased prices for gasoline paid in the aftermath of the Exxon Valdez oil spill in Alaska. *Id.* at 806. The Ninth Circuit found it unnecessary to consider the *Robins Dry Dock* rule because proximate cause could not be reasonably established under the facts alleged. *Id.* at 808. In doing so, the court's decision lacks even a mention of the *M/V Testbank* decision or a discussion relevant to the present dispute. Furthermore, in *M/V Testbank*, the Fifth Circuit approved of the Ninth Circuit's policy on foreseeability expressed in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) [hereinafter *Union Oil*],

which opinion carved out an exception to the *Robins Dry Dock* rule for commercial fishermen. *See* 752 F.2d at 1025-27. The Ninth Circuit's opinions, therefore, fail to evidence any "conflict" with the decisions in this matter.

Petitioner's reliance on statutory laws further fails to establish any relevant conflict with the Court of Appeals in this matter. In its petition, BPNAP cites the Court to the following statutes: the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675; and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(4). By doing so, Petitioner evidently seeks to buttress its erroneous contention that the Court of Appeals somehow violated *Robins Dry Dock* in this case. Notwithstanding that none of these statutes applies to this matter, BPNAP fails to even cite any jurisprudence interpreting these statutes that conflicts with the application of the proprietary interest requirement by the Court of Appeals in this case. The Fifth Circuit's allegedly "incorrect reading" of *Robins Dry Dock*, therefore, fails to conflict with any relevant statutory law.

The Fifth Circuit in *M/V Testbank* specifically referred to the results reached by other courts in precluding recovery for purely economic losses. In so doing, the court stated:

> [T]he decisions of courts in other circuits convince us that *Robins Dry Dock* is both a widely used and necessary limitation on recovery for economic losses. The holdings in *Kinsman* and *Union Oil* are not to the contrary. The courts in both those cases made plain that restrictions on

> the concept of foreseeability ought to be imposed where recovery is sought for pure economic losses.

752 F.2d at 1027. Hence, the Fifth Circuit found these allegedly conflicting decisions to be reconcilable, if not in accord, with its own view of the *Robins Dry Dock* rule. In this instance, the courts below did not establish some new standard requiring actual ownership but rather relied on established requisites of proprietary interest. Hence, the Court of Appeals failed to create a conflict with the Second, Fourth, Sixth, and Ninth Circuits or any relevant statutory law.

A true conflict between the circuits or federal statutory law does not exist with respect to the decisions in this matter. Thus, the instant matter does not warrant review by the Court on this basis.

II. The courts below properly held that Petitioner may not recover purely economic damages under state law in this action.

A. The courts below properly held that the maritime law preempted Petitioner's state law claim.

The District Court and the Court of Appeals properly found that, in this instance, the admiralty law displaced and preempted state law. The courts below recognized that a contrary result would have compromised and conflicted directly with the long-established *Robins Dry Dock* rule.

The Fifth Circuit, in *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir.) (*en banc*), *cert. denied*,

409 U.S. 948 (1972), succinctly stated the maritime preemption test as follows:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

Id. at 818. *See generally* 2 C.J.S. *Admiralty* § 10 (1972 & Supp. 1993) ("A cause of action arising under the maritime law is governed by admiralty law principles and by federal substantive and procedural law.") The state law remedy sought by Petitioner directly conflicted with the *Robins Dry Dock* prohibition against recovery for economic loss absent physical injury to a proprietary interest. Hence, the application of Article 2703 of the Louisiana Civil Code or any other state remedy would have prejudiced a characteristic feature of admiralty and disrupted the harmony or uniformity of maritime law.

Petitioner's arguments regarding the alleged erroneous application of the Admiralty Jurisdiction Extension Act (the "Admiralty Extension Act"), 46 U.S.C. § 740, confuse jurisdiction with choice of law principles. *See generally* Joseph E. Edwards, Annotation, *Validity, Construction, and Application of Admiralty Jurisdiction Extension Act (46 USCS § 740)*, 14 A.L.R. Fed. 664, 673-74 (1973 & Supp. 1993) (noting general effect of Admiralty Extension Act). Specifically, the courts below found no distinction between jurisdiction under the Admiralty Extension Act

and "pure" admiralty jurisdiction when applying maritime law to the exclusion of state law. Petitioner, however, mischaracterizes these holdings by suggesting that the District Court and the Court of Appeals somehow used the Admiralty Extension Act to displace state law totally.

This Court's decision in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), evidently forms the basis of Petitioner's position but provides no support to its arguments—factually or legally. In *Askew*, the Court merely held "that sea-to-shore pollution--historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." *Id.* at 343. Prior to reaching such conclusion, the *Askew* court emphasized that "state regulation" must yield where a direct conflict with federal law exists. *Id.* at 341. The *Askew* facts, therefore, do not align with the facts at hand as a clear conflict with maritime law would occur through application of state law in this instance.

The District Court and Court of Appeals properly considered maritime choice of law principles and precluded application of state law remedies to this case. To permit Petitioner to assert a claim for economic damages under state law in this case would violate a long-standing and established admiralty principle.

B. The courts below properly exercised diversity jurisdiction over Petitioner's state law claim.

The record below established one crucial fact: Petitioner intended to sue and sued a New York corporation at the commencement of this lawsuit. Contrary to assertions that a Delaware corporation allegedly appeared in this action, the New York corporation has not been dismissed nor has any party moved to substitute the proper party-defendant. Moreover, the party over which BPNAP raises the instant dispute occupies the status of a holding company for Waterman Steamship Corporation and, hence, does not even represent a necessary party to this litigation. Respondent, therefore, submits that diversity jurisdiction existed at the time the District Court and the Court of Appeals ruled and continues to exist at this time.

C. The courts below properly exercised subject matter jurisdiction and considered Petitioner's state law claim even if diversity jurisdiction failed to exist.

Notwithstanding the existence or absence of diversity jurisdiction, the District Court and the Court of Appeals necessarily exercised admiralty jurisdiction over Petitioner's state law claim to decide the rights and liabilities of the parties. The arguments posed by BPNAP confuse jurisdiction with choice of law and the *power* of the federal courts to adjudicate matters within the admiralty jurisdiction.

The fact that diversity may have been alleged as an alternative basis of jurisdiction lacks relevance to the

substantive law applied by the courts below. In this respect, Professor Charles Wright has noted:

> If a claim based upon a maritime tort is asserted in a suit brought under the admiralty jurisdiction of the federal district courts, neither diversity of citizenship nor a minimum jurisdictional amount in controversy is required, and the fact that diversity jurisdiction also can be alleged as a basis of subject matter jurisdiction is of no moment. Moreover, both the procedural aspects and the substantive features of a maritime tort action under federal admiralty jurisdiction will be governed by federal law. As with other questions of subject matter jurisdiction, if "the factual findings regarding subject matter are intertwined with the merits," jurisdiction will be assumed unless the maritime basis for the claim is "immaterial or is wholly insubstantial and frivolous."

14 Charles A. Wright et al., *Federal Practice and Procedure* § 3676 (Supp. 1993) (footnotes omitted); *see Parker v. Gulf City Fisheries, Inc.*, 803 F.2d 828, 829 (5th Cir. 1986). This passage highlights the fact that the jurisdictional basis for a suit arising out of a maritime tort does not determine the federal court's power to decide the substantive law applied by it to such tort. Thus, the existence or absence of diversity in a case arising under admiralty jurisdiction lacks relevance in assessing whether a federal court retains power to decide state law issues arising out of a maritime tort.

Petitioner's fundamentally flawed position in the courts below did not comport with longstanding tenets of admiralty law. For years, the United States Supreme

Court has recognized that the rights and liabilities of litigants should not depend on the particular courthouse or the "side" of the same courthouse in which an action has been brought. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411 (1953). BPNAP "does not have the power to choose 'whether . . . liability shall be measured by common-law standards rather than those of the maritime law.' " *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 208 n.5 (1st Cir. 1988) (citing *Chelentis v. Lukenbach S.S. Co.*, 247 U.S. 372 (1918)). The Supreme Court in *Chelentis* noted:

> The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Chelentis, 247 U.S. at 384. Petitioner, therefore, lacked the prerogative to preclude a federal court in which it invoked jurisdiction from ruling that the maritime law controls the rights of the parties to the exclusion of state law.

The exercise of admiralty jurisdiction required the courts below to determine and to apply the substantive laws giving rise to the rights and liabilities of the parties. In deciding a case arising out of a maritime tort, a court properly and necessarily determines whether state law may be used to supplement the maritime law. *See Vessel Morning Star*, 457 F.2d at 818. Here, pursuant to admiralty jurisdiction, the District Court and the Court of Appeals needed to determine whether a right provided to lessees under state law directly conflicted with the maritime law. Thus, in this case arising out of a maritime tort, the controlling legal principles required the courts below to rule on Petitioner's state law claim regardless of the existence or absence of diversity.

The basic premise of and arguments raised by Petitioner lack legal support because the courts below properly exercised admiralty jurisdiction. In doing so, the District Court and the Court of Appeals necessarily passed upon questions of maritime *and* state law inextricably intertwined with the facts giving rise to this case and controversy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioner, BP North America Petroleum, Inc., should be denied.

Respectfully submitted,

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